No. 96-521

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

ONE WORLD ONE FAMILY NOW, a Hawaii non-profit corporation; JAMES McDONOUGH, an individual; BHAKTIVEDANTA MISSION, LTD., a Hawaii non-profit corporation; and ANTON VOIGHT, an individual,

Petitioners,

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, individually and in his capacity as Mayor of the City and County of Honolulu; MICHAEL NAKAMURA, Chief of Police; DONNA WOO, individually and in her capacity as Special Deputy Attorney General of the State of Hawaii; and John Does 1-10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

DAROLYN H. LENDIO
Corporation Counsel
DONNA M. WOO
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street
Honolulu, Hawaii 96813
(808) 527-5688

KATHLEEN M. SULLIVAN
Counsel of Record
Special Deputy Corporation Counsel
Crown Quadrangle
Stanford, California 94305-8610
(415) 725-9875

JON M. VAN DYKE
Special Deputy Corporation Counsel
2515 Dole Street
Honolulu, Hawaii 96822
(808) 956-8509

November 21, 1996

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OR CALL COLLECT (402) 342-2831

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

In their Reply Brief, Petitioners contend that because of the recent decision in *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996), there is now a conflict between the Second and Ninth Circuits regarding the constitutional principles governing sidewalk vending laws. The facts in *Bery* are, however, so dramatically different from those in the present case that the holdings of these cases *are not* in conflict. The *Bery* holding is compatible with the holding of the Ninth Circuit in the present case, and these issues do not require review or clarification from this Court.

The *Bery* court found New York City's city-wide General Vendors Law to be unconstitutional because it was written and enforced in such a way that vendors of artwork were effectively excluded from selling their creations on any sidewalk throughout the city. The New York ordinance required vendors of nonfood goods and services to obtain a permit in order to sell any merchandise on the sidewalk, but only 853 permits were issued (to nonveterans), these permits were rarely available, and the court viewed the ordinance as "a de facto bar preventing visual artists from exhibiting and selling their art in public areas in New York." 97 F.3d at 697.

The *Bery* facts are different from those in the present case in several crucial respects:

(1) The New York City ordinance covered all of New York, and the record prepared in the *Bery* case was not adequate to demonstrate that a total ban on the display of artwork on all the sidewalks throughout the

City was necessary "to ensure street safety and lack of congestion" on all the City's many sidewalks. *Id.*

By sharp contrast, Honolulu's peddling ordinance (Section 29-6.2(b)(7), Revised Ordinances of Honolulu, reprinted at Pet. 2-3) carefully identifies only nine limited areas where peddling is prohibited. These nine areas were selected because they have special scenic beauty or historical importance, or because they present special problems of pedestrian movement and safety. The Ninth Circuit found that the compact Waikiki Special District met all three criteria: it is an area of great natural beauty and historical importance and its sidewalks are unusually congested. Pet. App. 6-11.

(2) The New York City ordinance contained an exception for veterans, who were allowed to obtain permits without regard to the overall number of permits issued. This exemption had the effect of casting doubt on the City's asserted interest in reducing the number of vendors, because the number of vending permits was randomly linked to the number of veterans who requested them rather than to any rational planning interests related to congestion or any other governmental goal.

Again by contrast, the Honolulu peddling ordinance has no such exception and is written and enforced in an even-handed fashion to promote the government's valid municipal interests.

(3) The New York City ordinance has another broad exception for vendors of newspapers, books, and all other written materials. The *Bery* court viewed the City's distinction between written and visual creative materials as

unjustified, and again saw the lack of regulation of vendors of written materials as casting doubt on the City's commitment to its asserted goals of safety and pedestrian movement.

Honolulu's peddling ordinance, by contrast, contains only three carefully limited exemptions: "newspapers of general circulation," "duly authorized concessions," and souvenir items sold in conjunction with parades. Honolulu Rev. Ordinances, sec. 29-6.2(b) and (c). The Ninth Circuit recognized that "[b]ecause these exemptions don't enable the city to discriminate against ideas it disfavors, they don't render the ordinance content-based. *See Leathers v. Medlock*, 499 U.S. 439, 450 (1991)." Pet. App. 8 n.5. Nor did Petitioners challenge these exemptions in their Petition.

(4) Because the New York City ordinance was city-wide, the *Bery* court ruled that its effect was to deny artists any appropriate alternative channel of communication to reach their intended audience.

The Honolulu peddling ordinance, because it is limited to nine carefully delineated areas, allows an enormous number of alternative locations throughout the City of Honolulu where sidewalk peddling is permitted.

CONCLUSION

Because of the significant factual differences between the ordinance under review in *Bery* and Honolulu's peddling ordinance, the Second Circuit's holding in *Bery* is not inconsistent with the Ninth Circuit's holding in the

present case. Because no conflict among the circuits exists and for all the other reasons set forth in the Brief in Opposition, Petitioners' request for a writ of certiorari should be denied.

Respectfully submitted,

DAROLYN H. LENDIO
Corporation Counsel
DONNA M. WOO
Deputy Corporation Counsel
City and County of Honolulu
530 South King Street
Honolulu, Hawaii 96813
(808) 527-5688

KATHLEEN M. SULLIVAN
Counsel of Record
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